

This draft Statutory Instrument supersedes the draft Legal Services Act 2007 (Warrant) Regulations 2010 which were laid before Parliament and published on 10th February 2010. It is being issued free of charge to all known recipients of that draft Statutory Instrument.

Draft Regulations laid before Parliament under section 206(4) and (5) of the Legal Services Act 2007 (c. 29) for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2012 No. [XX]

LEGAL SERVICES, ENGLAND AND WALES

The Legal Services Act 2007 (Warrant) Regulations 2012

Made - - - -

Coming into force in accordance with regulation 1(1)

The Lord Chancellor makes the following Regulations in exercise of the powers conferred by sections 42(6) and (7) and 48(6) and (7) of the Legal Services Act 2007(a).

The Lord Chancellor has consulted the Legal Services Board about the making of these Regulations in accordance with sections 42(8)(b) and 48(8)(b) of that Act.

A draft of these Regulations has been approved by a resolution of each House of Parliament pursuant to section 206(4) and (5) of that Act.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Legal Services Act 2007 (Warrant) Regulations 2012 and come into force on the day after the day on which they are made.

(2) In these Regulations—

“the 2007 Act” means the Legal Services Act 2007;

“approved or former regulator” means—

(a) in relation to a warrant issued under section 42(3) of the 2007 Act, the approved regulator(b) in respect of whose premises that warrant was issued; and

(b) in relation to a warrant issued under section 48(3) of the 2007 Act, the former regulator (c) in respect of whose premises that warrant was issued;

“judicial officer” means—

(a) a judge of the High Court;

(a) 2007 c. 29.

(b) “Approved regulator” has the meaning given in section 20(2) of the 2007 Act. By virtue of section 67 of that Act the powers to issue warrants contained in sections 42 and 48 of the 2007 Act cannot be used in relation to the Legal Services Board in its capacity as an approved regulator.

(c) “Former regulator” has the meaning given in section 48(1) of the 2007 Act.

Comment [LSB1]: LSA s42(3) and 48(3) restricts the LSB to entering/searching “the premises of the [AR]”. For those ARs that have delegated their regulatory functions to other bodies, we need to be sure that the office(s) of the regulatory body is included in the AR’s premises. It is essential that we are able to access records that are held off site (eg on computer servers and document storage facilities). It is not clear that the current drafting achieves this.

What would happen if the AR has a virtual office or runs its operations from someone’s home (eg the Cost Lawyers Standards Board)? Also, if we seized records (from any sort of office), we might also need information from the AR to enable them to be de-encrypted. It is not clear that the current drafting would cover either situation.

If the AR is based outside England or Wales (eg ACCA and ICAS have offices in Scotland and we understand that their records are in Scotland as well) would these warrant regulations apply there?

- (b) a Circuit judge; or
 - (c) a justice of the peace;
- “officer or agent” means—

(a) in relation to an application made under section 42(3) of the 2007 Act, the specified person^(a) or a person appointed by the specified person to act on its behalf; and

(b) in relation to an application made under section 48(3) of the 2007 Act, a person appointed by the Legal Services Board to act on its behalf.

(3) Except in paragraph (2) and in regulation 5(4), a reference in these regulations to a warrant is a reference to a warrant which has been or may be issued under sections 42(3) or 48(3) of the 2007 Act.

Conditions for issuing a warrant

2. A judicial officer may issue a warrant only if satisfied that—

- (a) reasonable attempts have been made to obtain the records sought by other means or, if reasonable attempts to obtain those records have not been made, that such attempts would likely result in the records being removed, hidden, tampered with or destroyed; and
- (b) no judicial officer has refused to issue a warrant based on another application that is in substance the same.

Execution of a warrant

3.—(1) Entry and search under a warrant must be—

- (a) within one month from the date of its issue; and
- (b) at a reasonable hour unless it appears to the officer or agent executing it that the purpose of entry may be frustrated by entry at a reasonable hour.

(2) If the occupier of the premises is present when the officer or agent seeks to execute the warrant, the officer or agent must—

- (a) identify himself to the occupier and show the occupier documentary evidence of identity;
- (b) show the warrant to the occupier; and
- (c) give the occupier a certified copy of the warrant.

(3) If the occupier of the premises is not present when the officer or agent seeks to execute the warrant, but a person who appears to be in charge of the premises is present, paragraph (2) has effect as if each reference to the occupier were a reference to that other person.

(4) If there is no person present at the premises who appears to be in charge of them, the officer or agent must leave a certified copy of the warrant in a prominent place on the premises.

(5) The officer or agent who executes the warrant must make an endorsement on it stating—

- (a) whether any of the records sought were found;
- (b) whether any written or electronic records have been copied; and
- (c) whether possession has been taken of any written or electronic records.

(6) In the case of a warrant that authorises entry to and search of two or more sets of premises, the officer or agent executing the warrant—

- (a) must make a separate endorsement in accordance with paragraph (5) for each set of premises entered and searched; and
- (b) must specify in each endorsement the premises to which it relates.

(a) “Specified person” has the meaning given in section 42(9) of the Legal Services Act 2007.

Notice and return of records taken

4. An officer or agent who takes possession of any written or electronic record under a warrant must—

- (a) provide a list of those records to the approved or former regulator within a reasonable time;
- (b) return any record to the approved or former regulator—
 - (i) once it has been copied;
 - (ii) within 7 days of receipt of a request by the regulator stating that the record is required by that regulator to discharge a regulatory function; or
 - (iii) when the intervention direction is revoked under section 44 of the 2007 Act, whichever is earliest, unless the regulator agrees otherwise in writing.

Comment [LSB2]: This may not be possible if the “former regulator” has had its designation cancelled for all reserved legal activities; there may be no one to give the list to. In such circumstances we would envisage using “reasonable endeavours” to fulfil these obligations (such as sending the list or records to the registered address). The drafting needs to reflect this.

Comment [LSB3]: See comment on clause 4(a)

Comment [LSB4]: The phrase “the regulator” is not defined – should it be “approved or former regulator”?

Comment [LSB5]: The phrase “the regulator” is not defined. Should it be “approved regulator” as it has now been reinstated even though it was previously a “former regulator”?

Copying of records

5.—(1) This regulation applies to any record of which an officer or agent has taken possession by virtue of a warrant.

(2) Where the record taken is electronic, the officer or agent may produce records from it in a form that —

- (a) is visible and legible; and
- (b) can be copied,

for the purpose of determining whether the record may be copied in accordance with paragraphs (3) and (4).

(3) Except as provided by regulation 6, the officer or agent may take copies of—

- (a) any record mentioned in paragraph (1); and
- (b) any record produced in accordance with paragraph (2),

for the purpose mentioned in paragraph (4).

(4) The purpose referred to in paragraph (3) is—

- (a) in relation to a warrant issued under section 42(3) of the 2007 Act, that the record is needed for the purpose of the exercise by the specified person of the relevant function; and
- (b) in relation to a warrant issued under section 48(3) of the 2007 Act, that the record is needed for the purpose of continuing regulation.

Legal privilege

6.—(1) The powers conferred by a warrant may not be exercised to copy protected items (as defined in paragraph (2)) and such items must be returned as soon as they are identified as such.

(2) Protected items are items subject to legal privilege (within the meaning of section 10 of the Police and Criminal Evidence Act 1984(a)), where the approved or former regulator is the client with the benefit of the privilege.

Notice to be given of records copied

7. An officer or agent who copies any written or electronic record under sections 42(4) or 48(4) of the 2007 Act or under these regulations must, at the request of the approved or former regulator, provide a list of what was copied.

(a) 1984 c. 60.

Retention of copies

8. A copy of written or electronic records taken under sections 42(4) or 48(4) of the 2007 Act or under these regulations may not be retained for longer than is necessary in all the circumstances.

Comment [LSB6]: See comments on clause 4 above – it may not be possible to return documents if the regulator has closed down, although this possibility may be covered by the phrase "in all the circumstances".

Signed by authority of the Lord Chancellor

Name
Parliamentary Under Secretary of State
Ministry of Justice

Date

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made under sections 42(6) and (7) and 48(6) and (7) of the Legal Services Act 2007 ("the 2007 Act"). Sections 42 and 48 of that Act permit the Legal Services Board ("the Board"), a person nominated by the Board as provided in section 41(2) of that Act, a person appointed to act for the Board or that person's nominee to apply in certain circumstances for a warrant authorising the applicant to enter and search the premises of the approved regulator and take possession of any written or electronic records found on the premises. Those circumstances are where the Board has given an approved regulator (within the meaning of the 2007 Act) an intervention direction under section 41 of the 2007 Act or where an order of the Lord Chancellor under section 45 that Act has cancelled a body's designation as an approved regulator.

Regulation 2 specifies the conditions and matters of which a judge of the High Court, circuit judge or justice of the peace must be satisfied before issuing a warrant.

Regulation 3 regulates the execution of the warrant.

Regulations 4 and 5 regulate the exercise of the powers conferred by the warrant where the person executing it takes possession of documents under it.

Regulation 6 makes provision limiting the circumstances in which written or electronic records may be copied under sections 42(4) and 48(4) of the 2007 Act or under these regulations.

Regulations 7 and 8 make further provision which applies where documents are copied under sections 42(4) and 48(4) of the 2007 Act or under the regulations.

The Board has made rules about the persons who may be appointed to apply for a warrant as required by section 42(10) of the 2007 Act.

An Impact Assessment has been prepared for these regulations and a copy is annexed to the Explanatory Memorandum, which is available alongside these regulations on the website for the Office of Public Sector Information (OPSI).

Comment [LSB7]: Is this still the case?